RECEIVED
APR 3 1975.
OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO. 74-6293

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

PHILIP J. GOLDBERG,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari
to the United States Court of Appeals
For the Ninth Circuit

DONALD C. SMALTZ
515 South Flower Street
Suite 4404
Los Angeles, California 90071

ANDREW I. SPILKER
One Wilshire Building
Suite 2420
Los Angeles, California 90071

Attorneys for Petitioner

INDEX

Page

Opinion Below 1

Jurisdiction 1

Questions Presented 2

Constitutional Provisions and Statutes Involved . . 4

Statement of the Case 5

Reasons for Granting the Writ 9

I. THE GOVERNMENT'S EXTRACTION FROM THE GRAND JURY OF A COMPLEX 17 COUNT INDICTMENT AGAINST FIVE DEFENDANTS IN THE TOTAL ELAPSED TIME OF ONE HOUR, THUS LIMITING THE GRAND JURORS' CONSIDERATION OF THE CHARGES, THE EVIDENCE, THEIR DELIBERATIONS AND VOTING TO 42 SECONDS PER COUNT PER DEFENDANT, DENIED PETITIONER'S FIFTH AMENDMENT RIGHT TO INDICTMENT BY AN INFORMED GRAND JURY 9

II. THE TOTALITY OF THE PROSECUTOR'S CONDUCT WITH THE GRAND JURY DENIED PETITIONER A FURTHER FIFTH AMENDMENT RIGHT -- THE RIGHT TO DUE PROCESS 13

III. THE TRIAL COURT DENIED PETITIONER, AN INDIGENT, HIS FIFTH AMENDMENT RIGHT TO DUE PROCESS AND SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL, WHEN IT REFUSED TO REQUIRE THE GOVERNMENT TO MAKE ITS JURY BOOK AVAILABLE TO PETITIONER OR, IN THE ALTERNATIVE, REFRAIN FROM USING IT . . . 18

IV. PETITIONER WAS DENIED DUE PROCESS OF LAW WHERE THE TRIAL COURT, DESPITE PETITIONER'S TIMELY REQUEST, REFUSED TO INSTRUCT THE JURY CONCERNING EVIDENCE OF PETITIONER'S GOOD CHARACTER WHICH HAD BEEN RECEIVED DURING THE TRIAL 23

V. PETITIONER WAS DENIED DUE PROCESS OF LAW WHERE THE TRIAL JUDGE INSTRUCTED THE JURY THAT IT COULD CONSIDER EVIDENCE OF UNCHARGED MISCONDUCT AS PROOF OF HIS GUILT, AND WHERE THE PROSECUTOR ARGUED SAID UNCHARGED MISCONDUCT TO THE JURY IN VIOLATION OF COURT ORDER 25

VI. PETITIONER WAS DENIED DUE PROCESS OF LAW WHERE THE GOVERNMENT DESPITE HIS REQUEST FAILED TO REVEAL THE FULL DETAILS OF A PLEA BARGAIN ARRANGEMENT MADE WITH THE KEY GOVERNMENT WITNESS AND AFFIRMATIVELY MISLED THE JURY AS TO THE TRUE NATURE OF SAID AGREEMENT . . . 28

VII. PETITIONER WAS DEPRIVED OF HIS FIFTH AND SIXTH AMENDMENT RIGHTS WHEN THE TRIAL COURT REFUSED TO LET PETITIONER'S ATTORNEYS TESTIFY AS TO THE GOVERNMENT'S THREAT TO INDICT A KEY DEFENSE WITNESS AND TO A MAJOR GOVERNMENT WITNESS' PRIOR INCONSISTENT STATEMENTS . . 32

VIII. THERE IS NO WORK PRODUCT EXCEPTION TO THE JENCKS ACT, AND WHERE A GOVERNMENT ATTORNEY TAKES NOTES FROM THE KEY PROSECUTION WITNESS AND READS THOSE NOTES BACK TO THE WITNESS WHO CORRECTS SAME, THE NOTES ARE COMPELLABLE UNDER BOTH THE JENCKS ACT AND BRADY V. MARYLAND. 38

Conclusion 42

Appendices A - F

CITATIONS

Pages

Cases:

Alford v. U.S., 282 U.S. 687 (1931) 37

Anthony v. U.S., 256 F.2d 50 (9th Cir. 1958) . . . 26

Baker v. U.S., 310 F.2d 924 (9th Cir. 1962) 26

Beavers v. Henkel, 194 U.S. 73 (1904) 11

Bird v. U.S., 180 U.S. 356 (1901) 26

Brady v. Maryland, 373 U.S. 83 (1963) . 4, 30, 39, 41

Branzburg v. Hayes, 408 U.S. 665 (1972) 12, 15

Campbell v. U.S., 365 U.S. 85 (1961) 40

Clancy v. U.S., 365 U.S. 312 (1961) 41

Costello v. U.S., 350 U.S. 359 (1956) . 15, 16, 17, 18

Davis v. Alaska, 415 U.S. 308 (1974) 37

DeMarco v. U.S., 415 U.S. 449 (1974) 31

Durbin v. U.S., 221 F.2d 520 (D.C. Cir. 1954) . . . 15

Edgington v. U.S., 164 U.S. 361 (1896) 24

Ex Parte Bain, 121 U.S. 1 (1886). 11

Giglio v. U.S., 405 U.S. 150 (1972) 30, 32

Gilmore v. Lynch, 319 F.Supp. 105 (1970) 21

Gordon v. U.S., 344 U.S. 414 (1953) 37

Griffin v. Illinois, 351 U.S. 12 (1956) 21, 22

Hale v. Henkel, 201 U.S. 43 (1906) 13

Hamer v. U.S., 259 F.2d 274 (9th Cir. 1958) 23

Hilliard v. U.S., 317 F.2d 150 (D.C. Cir. 1963) . . 40

Irvine v. California, 347 U.S. 128 (1954) 13

Michelson v. U.S., 335 U.S. 469 (1948) 24

Napue v. Illinois, 360 U.S. 264 (1959) 30

Ogden v. U.S., 303 F.2d 724 (9th Cir. 1962) 40

Palermo v. U.S., 360 U.S. 343 (1959) 40, 41

People v. Rochin, 342 U.S. 165 (1952) 13

Ring v. U.S., _____ U.S. _____, 95 S.Ct. 164 (1974). 31

Roberts v. LaVallee, 389 U.S. 40 (1967) 21

Rosenberg v. U.S., 360 U.S. 367 (1959) 41

Swain v. Alabama, 380 U.S. 202 (1965) 20, 21

U.S. v. Cramer, 447 F.2d 210 (2nd Cir. 1971) . . 16, 17

U.S. v. Dionisio, 410 U.S. 1 (1973) 9, 13

U.S. v. Estepa, 471 F.2d 1132 (2nd Cir. 1972) . . . 15

U.S. v. Gramolini, 301 F.Supp. 39 (D.C.R.I. 1969) . 17

U.S. v. Hilbrich, 341 F.2d 555 (7th Cir. 1965), cert. denied, 381 U.S. 941 (1965) 39, 42

U.S. v. Katz, 78 F.Supp. 435 (M.D.Pa. 1948). 35

U.S. v. Nixon, _____ U.S. _____, 94 S.Ct. 3090 (1974) 33

U.S. v. Noah, 475 F.2d 688 (9th Cir. 1973) 24

U.S. v. Parker, 469 F.2d 884 (10th Cir. 1972) . . . 26

U.S. v. Smaldone, 484 F.2d 311 (10th Cir. 1973). 39, 42

U.S. v. Thoresen, 428 F.2d 654 (9th Cir. 1970) . . . 16

U.S. v. Vole, 435 F.2d 774 (7th Cir. 1970) 35A

Washington v. Texas, 388 U.S. 14 (1967) 32

Weedin v. U.S., 380 F.2d 657 (9th Cir. 1967) 24

Woods v. Georgia, 370 U.S. 375 (1962) 12

United States Constitution:

Fifth Amendment 4

Sixth Amendment 4

Statutes:

18 U.S.C. § 3006A (Criminal Justice Act) 22

18 U.S.C. § 3500 (Jencks Act) 4, 39, 40, 42

Other Authorities:

ABA Code of Professional Responsibility, Ethical Consideration 5-10 34

ABA Standards Relating to the Administration of Criminal Justice (1974) 16

Attorney As Witness for Client in Federal Case, 9 A.L.R. Fed. 500 33

Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice (1963) 21

4 Blackstone 303 11

"Brady v. Maryland, and the Prosecutor's Duty to Disclose," 40 U.Ch.L.R. 112 (1972) 42

Charge of Judge Irving Kaufman, 17 F.R.D. 331 . . . 10

Charge of Judge Leon Yankwich, 19 F.R.D. 117 10

8 Moore's Federal Practice, Criminal Rules ¶ 6.02[2] 17

II Wigmore on Evidence, § 277, 3d Ed., 1940 35

No.. 74-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

PHILIP J. GOLDBERG,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari

to the United States Court of Appeals

for the Ninth Circuit

OPINION BELOW

The Memorandum Opinion of the Court of Appeals, which was directed by the Court not to be published in the official reports, is attached hereto as Appendix A. An order of the Court of Appeals denying a petition for rehearing is attached hereto as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on December 18, 1974. A timely petition for rehearing was denied on February 6, 1975. However, because counsel for petitioner did not receive notice of the denial from the Ninth Circuit Clerk's office until February 21, 1975, he applied to this Court and, pursuant to order of Honorable William J. Brennan, Jr., Associate Justice of the Supreme

Court, on March 5, 1975, an Order Extending Time to File Petition for Writ of Certiorari was granted, providing that petitioner had until April 5, 1975, in which to file a petition. This Court has jurisdiction under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

The questions presented are as follows:

1. Whether the Government in extracting a 17-count, complex indictment in a complicated mail fraud case against petitioner and four co-defendants within a one-hour period, thus limiting the grand jurors' consideration of the charges, the evidence, their deliberations, and their vote to a total of 42 seconds per count per defendant, denied petitioner's rights to accusation by a reasoned and informed grand jury required by the Fifth Amendment; and

2. Whether the totality of the prosecutor's conduct before the grand jury denied petitioner the Fifth Amendment right to due process where the prosecutor: extracted the indictment within a one-hour time period from the grand jury; refused to permit petitioner to appear before the grand jury when a subpoena duces tecum had been issued to petitioner directing his appearance; utilized hearsay testimony when better testimony was available; and had no reporter present in an effort to insure the prosecutor's manipulations were beyond judicial scrutiny; and

3. Whether petitioner, an indigent, was denied his Fifth Amendment right to due process and Sixth Amendment right to effective assistance of counsel where the trial court refused to require the Government to make available its jury book to petitioner, or in the alternative, to refrain from utilizing said book in the selection of the jury, where the trial court had stated it would not authorize

compensation for the efforts of counsel incurred in researching and assembling the voting records and idiosyncrasies of the panel; and

4. Whether petitioner was denied due process of law where the trial court, despite petitioner's request and over petitioner's objection, refused to instruct the jury concerning evidence of petitioner's good character which had been received during the trial; and

5. Whether petitioner was denied due process of law where the trial judge, in his charge to the jury, over petitioner's objection, instructed the jury it could consider evidence of uncharged misconduct against petitioner as proof of petitioner's guilt of the charges alleged in the indictment; and where the prosecutor argued certain uncharged misconduct to the jury in direct violation of the trial court's admonition that he not do so; and

6. Whether petitioner was denied due process of law where the Government, despite petitioner's repeated requests, failed to reveal the full details of a plea bargaining arrangement it had made with the key prosecution witness, and affirmatively misled the jury as to the true nature of said plea bargain arrangement; and

7. Whether the trial court's refusal to permit an attorney for petitioner to testify to the Government's threat to indict a key defense witness, and its further refusal to permit an attorney for petitioner to testify to a major Government witness's prior inconsistent statements, constitute denial of petitioner's Sixth Amendment right to have compulsory process for obtaining witnesses and to have the assistance of counsel for his defense and Fifth Amendment right to due process; and

8. Whether 18 U.S.C. § 3500, the Jencks Act, contains an "attorney's work product exception"; and whether a Government attorney's notes of conversations with the key Government witness, to whom the prosecutors read back their notes from time to time where the witness corrected same, which notes were prepared "only after lengthy conversations had occurred and a mutual understanding of the factual situation" had been reached, if not compellable under the Jencks Act, are compellable under the doctrine of Brady vs. Maryland.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This Petition involves the following Constitutional provisions:

a. Fifth Amendment, United States Constitution:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War of public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

b. Sixth Amendment, United States Constitution:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

This Petition involves the following statute:

18 U.S.C. § 3500, Demands for production of statements and reports of witnesses.

The full text is set forth in Appendix C.

STATEMENT OF THE CASE

In October, 1970, a 17-count indictment was filed in the United States District Court, District of Arizona, Phoenix Division, charging petitioner Philip J. Goldberg and co-defendants, Edwin S. Newman, Emil Tucker, William Miles Skillman, and Robert Stanley Clark, with violations of 18 U.S.C. § 1341, the mail fraud statute. Petitioner was the only defendant whose case went to trial. Tucker, Skillman and Clark had all pleaded guilty to at least one count of the indictment. Tucker and Skillman were sentenced before and Clark was sentenced after petitioner's trial. Immediately prior to trial, the Government dismissed three of the 17 counts of the indictment, and severed co-defendant Newman's case from petitioner's. After his testimony at petitioner's trial, the indictment against Newman was dismissed. The trial against petitioner commenced May 22, 1973, before a jury, and on July 14, 1973, the jury found petitioner guilty on all 14 counts. (C.T. 78)*

On October 5, 1973, petitioner was sentenced to a term of two years imprisonment on each of the 14 counts of which he was convicted, the prison sentence to be served concurrently, and a fine of $1,000 on each of the counts. (C.T. 546)

The facts upon which the convictions were based are as follows:

In late 1967, petitioner was the president of Financial Security Life Insurance Company (hereinafter "FSL"), a privately held full reserve life insurance company chartered in Arizona and having in excess of $112 million worth of

---

* "C.T." refers to Clerk's Transcript.

life insurance in force. (Ex. 1-C, p. 15)* In late 1967, petitioner and his co-defendant, Edwin S. Newman, implemented a concept whereby executives could exchange restricted assets, such as lettered stock, for a single premium annuity policy. The effective commencement pay-off date of the policy would coincide with the lifting of the investment restrictions on the stock so that the stock could be sold by the holder and in the intervening period the annuitant would have a fully paid policy to be used for various purposes, including collateral for loans. (M 80-82)

In the majority of instances, FSL took from the annuitant as payment for the annuity policies a premium note in the face amount of the policy. A premium note is legitimate payment for a policy under Arizona law. (B 223-224) The note, in turn, was usually guaranteed by a Colorado holding company, Financial General Capital Corporation (hereinafter "FGCC") in which petitioner owned a controlling interest. To induce FGCC to guarantee the premium note to FSL, the annuitant was usually required to transfer lettered stock in double the amount of the premium note. The conveyance of the stock to FGCC was coupled with an agreement whereby it could sell the stock after a stated period to fund its guarantee to FSL of the annuitant's premium note. Concurrently with the execution of the premium note, the annuitant was required to execute a "reservation of benefits and proceeds rider," which provided that, as between FSL and the annuitant, the value of the policy was reduced by the amount of the outstanding premium note.

---

* "Ex." refers to Exhibits at the trial.

** The Reporter's Transcript, which is in 15 volumes, each volume having a separate letter designation, lettered as Volumes A through O, inclusive, is referred to by the letter designating the volume and the page number.

The annuitant would utilize the annuity policy to collateralize a new or existing loan from a lender. (K 326-336) (Ex. Q-16) When the lender would inquire of FSL as to the value of the annuity policy, FSL would inform the lender that the policy was fully paid, that there were no liens or encumbrances against the policy, and that the face value of the policy was the cash surrender value of the policy. Because FSL did not necessarily follow the same procedure with regard to the issuance of all the policies, variations evolved as time went on.

On April 18, 1969, after a New York bank seized the proceeds of its statutory deposit there, FSL was suspended by the Arizona Insurance Commissioner. (B 252-256) FSL was prohibited from conducting any further business. (B 256, L 391) After protracted litigation with the Insurance Commissioner of Arizona, during the summer of 1969, the company was ultimately placed into receivership. (L 388) (Ex. 3-NN)

A. <u>The Scheme Charged in the Indictment</u>

The indictment (C.T. 1-18) alleged that commencing January 20, 1968, through January 9, 1970, petitioner and his four co-defendants devised a scheme for obtaining money by false statements to lending sources that could be induced to loan money and to take as collateral to secure the repayment of such loans, single-premium annuities of FSL. That in execution of this scheme, petitioner and his co-defendants caused annuity policies to be used to borrow money from persons, banks and other lending sources, and that as to these persons "that made and considered making loans" to be collateralized with single-premium annuity policies issued by FSL, defendants caused the following false statements to be made:

(a) That the premiums were paid in full on the annuity policies - whereas, no payments except interest payments had been made on the promissory notes accepted by FSL.

(b) There were no liens or encumbrances of record against single-premium annuity policies offered as collateral - whereas, the reservation of benefits and proceeds riders reduced the policies to zero.

(c) That the face amount of the policy was the cash surrender value that would be paid to the annuitant after the due date specified in the policy - whereas, said policies were worthless.

That defendants withheld and concealed from the lenders the material facts that promissory notes had been accepted by FSL in payment of premiums, and that the policies were subject to riders providing that the policies would be reduced by the total amount unpaid.

That when these policies were issued by FSL "and accepted by lenders as collateral" and presented for payment, the lenders would be informed that no amounts were payable because no payments had been made on the promissory note.

The 14 count mailings of the indictment upon which petitioner was tried involved annuities issued to six individuals. Two of the co-defendants, Clark and Skillman, received annuities. Tucker arranged for the placement of some annuities. Newman was the vice president and a director of FSL and president of the holding company, FGCC.

Petitioner's defense was that the annuity concept was lawful and proper, that he relied upon his attorneys, including Newman, to insure the legitimacy of the program, and that his attorneys, including Newman, reviewed and drafted

the responses to the lenders. That FSL rather than acting in concert with Skillman as the indictment alleged, had in fact been defrauded by Skillman, who had perverted the annuity concept for Skillman's own financial gain, and in the process bilked FSL out of over a million dollars.

REASONS FOR GRANTING THE WRIT

I. THE GOVERNMENT'S EXTRACTION FROM THE GRAND JURY OF A COMPLEX 17 COUNT INDICTMENT AGAINST FIVE DEFENDANTS IN THE TOTAL ELAPSED TIME OF ONE HOUR, THUS LIMITING THE GRAND JURORS' CONSIDERATION OF THE CHARGES, THE EVIDENCE, THEIR DELIBERATIONS AND VOTING TO 42 SECONDS PER COUNT PER DEFENDANT, DENIED PETITIONER'S FIFTH AMENDMENT RIGHT TO INDICTMENT BY AN INFORMED GRAND JURY.

This Court very recently reiterated a long-standing principle of American jurisprudence:

> "The Fifth Amendment guarantees that no civilian may be brought to trial for an infamous crime 'unless on a presentment or indictment of a Grand Jury.' This constitutional guarantee presupposes an investigative body 'acting independently of either prosecuting attorney or judge,' Stirone v. United States, 361 U.S. 212, 218 . . . whose mission is to clear the innocent, no less than to bring to trial those who may be guilty." U.S. v. Dionisio, 410 U.S. 1, 16-17 (1973).

The Government, through an Assistant United States Attorney and an attorney from the Department of Justice, extracted this complex 17-count indictment against petitioner and his four co-defendants in a single one-hour session on October 14, 1970. (A 72-76) This necessarily implies* that in that one hour the grand jurors: (i) were informed of the allegations of the indictment, (ii) heard and considered the

---

* Because the Assistant U.S. Attorney "didn't want a reporter present," there is no reporter's transcript of what occurred in this one-hour period. (A 76)

evidence, (iii) deliberated and voted to return a true bill.*

This case was not a garden-variety criminal case. At the trial, the Government during its case in chief (which spanned 22 days) called 35 witnesses.

The indictment alleged that five named defendants each acted in concert with the others and various persons in execution of the scheme alleged. Seventeen different lenders were stated to be involved. (Count 1) Out of the 17 count mailings, no two of these mailings were identical, either in format or in content. No two transactions which were the subjects of the events from which the mailings alleged in the indictment emanated were identical. In some instances FSL was seeking to obtain back policies it had issued; in others it was responding to inquiries from lenders or attempting to gain information from annuitants as to the whereabouts of policies; in other instances it was acknowledging the recordation of assignments, etc. Six of the letters were addressed to FSL from various individuals or organizations (Counts 3, 10, 11, 15, 16, 17); two were addressed to a co-defendant, Skillman (Counts 7 and 12); five were addressed to various lenders (Counts 1, 5, 6, 9, 14); one was addressed to petitioner (Count 2); one to an annuitant, Stacey (Count 8); and one to a third party who was neither an annuitant nor a lender (Count 8).

The trial judge at the commencement of the trial observed that the case was "complicated" (A 200) and he required 27 minutes just to read fourteen counts of the in-

---

* Grand juries are charged at the time they are empaneled that their "prime function is to decide whether or not sufficient evidence has been produced to indicate that a crime has probably been committed by the person accused." See Charge of Judge Irving Kaufman, 17 F.R.D. 331, 335; Charge of Judge Leon Yankwich, 19 F.R.D. 117, 121.

dictment to the petit jury. (A 202-218) The prosecutor's opening statement to the petit jury was prefaced with the observation, "We are faced with an extremely complex case . . ." Following that observation it took the prosecutor 1-1/2 hours to explain the nature of the charges in his opening statement to the petit jury. (A 279)

Petitioner is not suggesting that there is or should be some legal rule of thumb by which the length of the grand jury proceedings has to be proportionate to the length of the trial. Rather, he notes these facts only to demonstrate that the case was "complex" (the prosecutor's observation), that it was "complicated" (the trial judge's observation), and that it was impossible for the grand jury to give any meaningful consideration to the probable cause finding required for indictment by a grand jury, as the Constitution requires.

Except for the sagest of judges, it is an impossibility to read and understand this indictment in one hour, let alone consider any evidence against five defendants.

At least since the time of Blackstone the proper performance of the grand jurors' function required that the jurors:

> "be thoroughly persuaded of the truth of an indictment, so far as their evidence goes; and not to rest satisfied merely with remote probabilities: a doctrine that might be applied to very oppressive purposes." 4 Blackstone 303.*

This principle has continued to be a requirement for the proper operations of grand jurors in this country. Ex Parte Bain, 121 U.S. 1, 11 (1886), quoting Grand Jury Charge of Justice Field that:

---

* As quoted in Beavers v. Henkel, 194 U.S. 73, 84 (1904).

> "No person shall be required . . . to answer for any of the higher crimes unless this [grand jury] body . . . shall declare upon careful deliberation, under the solemnity of an oath, that there is good reason for his accusation and trial." (Emphasis added)

The grand jury is supposed to function as the primary security of the citizenry against hasty prosecutions and thus is charged with the duty "to determine whether a charge is founded upon reason or is dictated by an intimidating power or by malice and personal illwill." Woods v. Georgia, 370 U.S. 375, 390 (1962). It cannot begin to implement its constitutional duty in a case where the prosecutor is able to ramrod a complex indictment through it in a one-hour interval.

As observed in Branzburg v. Hayes, 408 U.S. 665, 701-702 (1972):

> "It is only after the grand jury has examined the evidence that a determination of whether the proceeding will result in an indictment can be made . . . ."

However, when the total elapsed time of the grand jury's consideration of the charges, hearing of the evidence, deliberations and voting can all be caused to occur within a one-hour period, thus allotting a total elapsed time of 42 seconds consideration per defendant per count, there is no way it can be seriously contended that the grand jury "examined" -- let alone understood and carefully deliberated upon the charges of the indictment.

A prosecutor's extraction of an indictment in a case like this constitutes ipso facto a perversion of the grand jury system and a denial of petitioner's right to indictment by a reasoned and informed grand jury as required by the Fifth Amendment. The statements noted supra from Ex Parte Bain, supra; Woods, supra; Branzburg, supra; and

Dionisio, supra are meaningless when a prosecutor who in fact controls the evidence that comes before a grand jury can accomplish what was done here.

This Court has long held that the abuses of the grand jury system occurring through a prosecutor's unilateral dealings with that body would be remedied, stating:

> "Were such abuses called to the attention of this Court, it would doubtless be alert to repress them." Hale v. Henkel, 201 U.S. 43, 65 (1906)

The Court stated in 1973 that "the Constitution could not tolerate the transformation of the grand jury into an instrument of oppression." Dionisio, supra, at 401 U.S., p. 12. That is precisely what occurred in this case -- through the unilateral dealings of the prosecutor with the grand jury. The conduct of the Government in this case is truly no less "shocking to the conscience" than the stomach pumping of Rochin (People v. Rochin, 342 U.S. 165, 169 (1952)), or the illegal month-long bugging of the defendant's bedroom in Irvine v. California, 347 U.S. 128 (1954).

Because petitioner was denied his right to be indicted by a grand jury which had the duty but not the opportunity to fairly consider the charges and the evidence, petitioner was denied a fundamental right at the very commencement of the criminal process. This Court should issue the writ so that it can put an end to these pernicious activities of prosecutors before Federal Grand Juries.

II. THE TOTALITY OF THE PROSECUTOR'S CONDUCT WITH THE GRAND JURY DENIED PETITIONER A FURTHER FIFTH AMENDMENT RIGHT -- THE RIGHT TO DUE PROCESS.

The deprivation suffered by petitioner did not end with merely the prosecutor's glib one-hour presentation of

this complex case and the denial to the grand jury of any meaningful opportunity to consider the nature of the charges, the evidence and the propriety of the indictment. Rather, it was accomplished by the following, which exacerbated the denial of petitioner's fundamental right to indictment by a grand jury and resulted also in a denial of petitioner's right to due process.

(1) Petitioner had been subpoenaed to appear before the grand jury at its October 14, 1970, session. The subpoena required him to appear and produce records relating to FSL. He duly appeared with the records on October 14. However, before appearing before the grand jury he was intercepted by the prosecutor who informed him he could not appear before the grand jury and instructed petitioner that he must turn over the records to the prosecutor.* (A 77-78) Petitioner requested the opportunity to testify, but the prosecutor refused.

(2) The Government's evidence before the grand jury consisted solely of two witnesses, neither of whom was percipient to the transaction or events. One was a postal inspector who testified that he was before the grand jury "about 30 to 45 minutes maybe." (A 69) The other, Trexler,** testified approximately 15 minutes. (A 79)

(3) No reporter's transcript of these witnesses' testimony or the prosecutor's comments to the grand jury was kept, because there was no reporter present since the prosecutor "didn't want one there." (A 76) So, there is no

---

* In addition to the prosecutor cancelling the subpoena to petitioner, he cancelled the subpoenas of other persons percipient to the activities giving rise to the allegations in the indictment.

** Trexler's trial testimony was solely concerned with the custody of certain records of FSL which he acquired pursuant to his designation as the receiver for FSL. (B 124-129)

record of what was said in their brief interval of testimony -- which lasted between 45 minutes and one hour "maybe."

Petitioner concedes that an accused has no absolute right to be called as a witness before the grand jury; however, by denying petitioner the right to testify, as was petitioner's duty pursuant to the grand jury subpoena in this case, the prosecutor was thus able to seal off any other evidence or explanation thereof favorable to petitioner, thereby insuring that the gossamer position of the Government before the grand jury was not disturbed. This was plainly wrong, as this Court has continually recognized the primary and nearly exclusive role of the grand jury as an agent of compulsory disclosure. Branzburg v. Hayes, 408 U.S. 665, 668 (1972). This Court has not recognized the United States Attorney's Office as a proper substitute for the grand jury room. The grand jury subpoena is a process of the district court, not a compulsory administrative process of the United States Attorney's Office as used by the Government in this case. Cf., Durbin v. U.S., 221 F.2d 520, 522 (D.C. Cir. 1954).

Petitioner acknowledges that under the authority of Costello v. U.S., 350 U.S. 359 (1956), hearsay evidence is admissible before a grand jury, and its use has been sanctioned in subsequent cases. Even so, the Second Circuit has invoked its supervisory powers and held that the prosecutor has an affirmative duty to tell the grand jury that it is listening to hearsay. See U.S. v. Estepa, 471 F.2d 1132 (2nd Cir. 1972), and collection of cases therein. Here there is nothing to indicate that the admonition that is required in the Second Circuit was in fact given to the grand jurors. Petitioner submits that the utilization of non-percipient witnesses should not properly be a

basis upon which indictments are rendered when percipient witnesses are readily available. That position is advanced by the American Bar Association. See ABA Standards Relating to the Administration of Criminal Justice, Sections 3.5 and 3.6, p. 90 (1974). Even if this Court declines to modify Costello or, in its supervisorial powers, require a warning similar to that of the Second Circuit, still the utilization of such witnesses cannot be condoned in this case since, when it is added to the other machinations of the prosecutor, the totality of circumstances requires reversal of petitioner's conviction.

Petitioner acknowledges that at the time the grand jury heard that testimony of the two witnesses, viz.: on October 7, 1970, he did not have an absolute right to a transcript absent a previous request and offer to pay the expenses of a reporter. U.S. v. Thoresen, 428 F.2d 654 (9th Cir. 1970). However, this concession does not operate to mitigate the Government's conduct in manipulating the grand jury in the instant case.

By refusing to have a reporter present to record the testimony because the prosecutor "didn't want one" the Government was able to mask the charade of de minimus evidence presented to the grand jury from discovery by anyone for all time.

In U.S. v. Cramer, 447 F.2d 210, 214 (2nd Cir. 1971), when faced with an issue where appellants there contended that failure to record grand jury testimony constituted a denial of due process, the court, per Judge Friendly, in denying the validity of this contention, stated:

> "While appellants raise the spectre of arbitrary and discriminatory prosecutorial conduct in selecting those cases in which grand jury testimony will be recorded, it will be time enough to deal with such a problem when, as, and

> if a defendant comes forth with any evidence suggesting bad faith on the part of the government--something appellants have utterly failed to do here."

Judge Oakes, in his dissenting opinion in that case, found the Government's failure to record a violation of Rule 6(d), F.R.Cr.P., "if not the due process clause of the Fifth Amendment. . ." (Id., at 221)

Recordation is recognized as the preferred method of dealing with witnesses' testimony before the grand jury, as it assists "in controlling overreaching or improper examination of witnesses by the prosecutor." 8 Moore's Federal Practice, Criminal Rules ¶ 6.02[2]. See U.S. v. Gramolini, 301 F.Supp 39, 42 (D.C.R.I. 1969).

The Government's dealings with the grand jury in these matters clearly deprived petitioner not only of his Fifth Amendment right to due process, but even a colorable parataxis implicit in the concept of ordered liberty. There is more here than a "spectre of arbitrary and discriminatory prosecutorial misconduct." There is actual misconduct and perversion when the actions of the prosecutor are juxtaposed with the total elapsed time of one hour for the grand jury's total consideration of this case.

The trial court at a pretrial hearing, while acknowledging that petitioner's arguments re perversion were meritorious, indicated that it did not have the authority to grant petitioner the relief requested, viz.: dismissal of the indictment. (A 89-90)

The Panel appeared to acknowledge the errors cited by petitioner in these arguments, but cited U.S. v. Costello, supra, as controlling in holding that the prosecutor's perversion was not "clear, prejudicial error." (Memorandum, page 7) An attempt to extend Costello to these lengths is

plainly wrong, as Costello holds only that an indictment is valid, although based entirely on hearsay. (Id., at 362.) Petitioner's research disclosed that Costello has been cited in at least 17 Supreme Court opinions, 195 Circuit Court opinions, and 137 District Court opinions. In not one of those opinions was there ever a hint that Costello would be authority to countenance the type of perversion which petitioner has demonstrated in this case.

This case is a shocking example of prosecutorial manipulation and perversion of the grand jury and the concomitant deprivation of petitioner's Fifth Amendment rights. The writ should be granted to clarify the extent of an accused's rights before the grand jury, since appellate courts refuse to recognize that in the twentieth century something other than fifteenth century notions of due process are required.

III. THE TRIAL COURT DENIED PETITIONER, AN INDIGENT, HIS FIFTH AMENDMENT RIGHT TO DUE PROCESS AND SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL, WHEN IT REFUSED TO REQUIRE THE GOVERNMENT TO MAKE ITS JURY BOOK AVAILABLE TO PETITIONER OR, IN THE ALTERNATIVE, REFRAIN FROM USING IT.

At a pretrial conference petitioner inquired of the Government "whether or not they intend to utilize a jury book in connection with the jury selection process . . ." (A 185)

A jury book is a compilation prepared by the U.S. Attorney's Office on the voting record and idiosyncracies of individual jurors on the panel. (A 185-186) The prosecutor indicated the Government's possession of such a book and its intention to use it. (A 186) Petitioner then moved that either the Government be prohibited from using the jury book in connection with the jury selection process

or, in the alternative, that it be made available to petitioner's counsel. (A 187) Petitioner was indigent and his counsel had been appointed under the Criminal Justice Act. The court indicated that it would not authorize compensation for the efforts incurred in researching and assembling the voting records and idiosyncrasies of the panel to prepare a comparable book by petitioner. (A 187) The court denied petitioner's request and the Government did use its jury book in the selection of the jury. (A 189)

There is no question but that petitioner was at a distinct disadvantage when the trial court refused to require the Government to make available its jury book to petitioner or, in the alternative, not to utilize it, since:

(1) Petitioner was an indigent and a nonresident of the district and state wherein the trial was held; and

(2) Petitioner's counsel was neither a resident of nor maintained an office in the district or even in the state where the trial was held, and was appearing pro hoc vice. Further, there was no correspondent local counsel to assist trial counsel because of petitioner's indigency; and petitioner was entirely without any useful information on the prospective jurors; and

(3) The voir dire conducted by the trial judge to the entire panel at one time, under the Arizona system*--

---

* Under the "Arizona system" of jury selection, the entire panel of jurors (37 in this case) was called, sworn and interrogated at one time by the judge. After challenges for cause were exercised by each side, Government and defense counsel were then required to separately state in writing their peremptory challenges and jointly submit them to the clerk, so that the first 12 individuals who were not challenged by either petitioner or the Government were then called by the court and became the jurors in the case. Under this system, at the time of exercising the challenge, neither counsel has any idea what jurors the other side has peremptorily challenged since it is stated in a separate writing by each side, which is then handed to the clerk who makes the tabulation. Petitioner's objection to this procedure was overruled. (A 190)

a procedure requiring petitioner to exercise his peremptory challenges concurrently with those of the prosecutor, and thus in effect in the dark--rendered useless the peremptories allowed petitioner.

The value of petitioner's access to a jury book, which gives at least the voting records and proclivities of the individual jurors, cannot be denied. This is particularly true when the procedure for voir dire--the Arizona system--involved the en banc questioning of the entire panel of jurors at one time. Envisage the scene from petitioner's vantage point: The 37 members of the panel, some seated in the jury box and some seated in the spectators' section, all being read voir dire questions and assertedly ready to orally respond sua sponte to a question if it pertained to him or her. Neither petitioner nor his counsel had any meaningful opportunity even to observe the impact of the questions on each of the individual jurors.

Under these circumstances, the denial of petitioner's access to the jury book is particularly acute when neither he nor his counsel is "local" to the community and where petitioner did not have the financial wherewithal to institute an inquiry into the background of the jurors. Thus, because of his indigency the petitioner's peremptories were rendered a nullity when contrasted with the Government.

This Court has observed that the right of a defendant to peremptory challenges:

> "is 'one of the most important rights secured to the accused.' . . . The denial or impairment of the right is reversible error without a showing of prejudice." Swain v. Alabama, 380 U.S. 202, 219 (1965). (Emphasis added)

In Swain, Mr. Justice White, after a review of some of the reasons that may prompt a party to exercise his peremptory challenges, concluded:

> "Hence, veniremen are not always judged solely as individuals for the purpose of exercising peremptory challenges. Rather, they are challenged in light of the limited knowledge counsel has of them . . ." 380 U.S. at 221.

Since Griffin v. Illinois, 351 U.S. 12, 17-18 (1956), the concepts of due process and equal protection require that if a defendant be indigent, the Government has an obligation to prevent discrimination and wealth from working an inequality in the criminal process.*

Equal protection of the laws requires that the mere fact of indigency should not place a defendant at a disadvantage, Roberts v. LaVallee, 389 U.S. 40, 42 (1967). Indigents have the same right of access to the courts as do any other defendants. That right to a fair trial "encompasses all the means a defendant or petitioner might require to get a fair hearing from the judiciary on all charges brought against him or grievances alleged by him." Gilmore v. Lynch, 319 F.Supp. 105, 110 (1970), aff'd. sub nom., Younger v. Gilmore, 404 U.S. 15 (1971).

While petitioner was required to exercise his challenges by total guesswork predicated on the vague and inadequate knowledge of the jurors he was able to obtain from the manner of voir dire conducted by the court, the Government was able to rely and did rely on the information contained in its jury book. By denying petitioner access

---

* While the Government may not be required to relieve an accused of his poverty, it may properly be required to minimize the effect of an accused's poverty on the Government's administration of justice.

> "A problem of poverty arises before the system of criminal justice when at any stage in the proceedings lack of means in the accused substantially inhibits or prevents the proper assertion of a right or a claim of right." Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice, pp. 5-11 (1963).

to the Government's jury book or, in the alternative, prohibiting the Government from using that book, the court prohibited petitioner from standing on an equal footing with the Government in intelligently exercising his challenges to any juror. This imbalance resulted from petitioner's indigency, since the trial court would not have authorized payment of the necessary expenses by petitioner in an effort to compile a similar book.*

The Sixth Amendment right to counsel includes the right to effective assistance of counsel. Certainly, if counsel for an indigent defendant cannot stand on equal footing with the Government prosecutor in the knowledge of the venireman's proclivities, propensities and voting records, this concept is violated particularly when indigent's counsel could be put on a par with the Government by permitting access to the book or simply denying the prosecutor the right to use that book. It matters not whether the right in this instance be labelled as concomitant to the due process clause of the Fifth Amendment or as falling within that portion of the Sixth Amendment guaranteeing the right of the defendant to the effective assistance of counsel, or both. What matters is that "there can be no equal justice when the kind of trial a man gets depends on the amount of money he has." Griffin, supra, 351 U.S. at p. 19.

The Panel below in upholding the trial court's ruling found no "prejudicial error" and cited to Hamer v.

---

* Counsel for petitioner was appointed pursuant to the Criminal Justice Act, 18 USC § 3006A, et seq. The United States pays the expenses of an indigent's defense in a criminal case, but it is up to the trial judge to determine which expenses are properly reimbursable and the Chief Judge of the Circuit to approve that determination. 18 USC § 3006A(b)(3).

U.S., 259 F.2d 274 (9th Cir. 1958) [p. 8 of Memorandum]. A citation to that case is erroneous, since Hamer expressly held that if the Government used a jury book, then:

> " . . . it is up to the individual judge to see that neither attorney has an unfair advantage over the other, whether by use of jury lists or jury books, or any other knowledge or information that exists with respect to a juror's previous action." 259 F.2d at 281.

Here the trial court violated the holding of Hamer when it permitted the Government to utilize the jury book and thus affirmatively permitted the Government an unfair advantage over petitioner. Petitioner submits that his conviction must be reversed.

IV. PETITIONER WAS DENIED DUE PROCESS OF LAW WHERE THE TRIAL COURT, DESPITE PETITIONER'S TIMELY REQUEST, REFUSED TO INSTRUCT THE JURY CONCERNING EVIDENCE OF PETITIONER'S GOOD CHARACTER WHICH HAD BEEN RECEIVED DURING THE TRIAL.

At the trial, affirmative evidence as to petitioner's good character was elicited through the testimony of witness Maryalice Darling.* She testified as to petitioner's excellent business reputation and general reputation for honesty and integrity. (B 199-201)

Prior to the trial court's instructions to the jury, petitioner, at the instruction conference, submitted proposed jury instructions concerning this character evidence, but the trial court refused to give any character evidence instruction whatsoever in the apparent mistaken belief that no reputation or character evidence had been received during the trial. A copy of the proposed instruction

---

* Mrs. Darling was called as a Government witness, and the favorable character testimony was elicited by way of cross-examination, with the trial court's permission, in order to avoid calling her later during petitioner's case in chief. (B 198-199)

is attached hereto as Appendix D. Petitioner's counsel attempted to convince the trial court that there had in fact been character evidence received during the trial, but to no avail. (O 84-86, 111, 113-114) No good character instruction of any sort was given by the trial court in its charge to the jury.

The relevance of a criminal defendant's character in resolving probabilities of guilt, and his right to introduce such evidence, together with appropriate instructions to the jury have long been recognized by this Court. Edgington v. U.S., 164 U.S. 361 (1896); Michelson v. U.S., 335 U.S. 469, 476 (1948).

In the instant case, petitioner was deprived of his right to have the jury instructed that it could consider the evidence of petitioner's good character as raising a reasonable doubt of his guilt of the charges against him. "It is reversible error not to instruct as to defendant's theory of the case if the record contains evidentiary support for the theory and the theory is supported by law." U.S. v. Noah, 475 F.2d 688, 697 (9th Cir. 1973).

The Memorandum Decision of the Court of Appeals below is totally silent as to this fundamental error committed by the trial judge, despite the fact that this issue was fully briefed and presented to the Panel for its determination. This is particularly inexplicable when the Ninth Circuit has held that "evidence of good character may be sufficient alone to create a reasonable doubt of guilt . . ." and that the jury must be so instructed. Weedin v. U.S., 380 F.2d 657, 660 (9th Cir. 1967).

We submit that the question of petitioner's criminal intent was the key issue at the time of trial. Had the jury been instructed as to the weight it could give to

the good character testimony that had been received in evidence, it might well have tipped the scales in petitioner's favor. The failure of the trial court to give the jury a proper character evidence instruction, despite the clear evidentiary support therefor, deprived petitioner of a fundamental right accorded him by due process of law, and petitioner's conviction must be reversed; alternatively, this Court should exercise the power of supervision over the lower federal courts and reverse petitioner's conviction, since the trial court's actions were a substantial departure from the accepted and usual course of judicial proceedings, and this departure was sanctioned by the Court of Appeals in its failure to respond to the trial court's error, much less correct it.

V. PETITIONER WAS DENIED DUE PROCESS OF LAW WHERE THE TRIAL JUDGE INSTRUCTED THE JURY THAT IT COULD CONSIDER EVIDENCE OF UNCHARGED MISCONDUCT AS PROOF OF HIS GUILT, AND WHERE THE PROSECUTOR ARGUED SAID UNCHARGED MISCONDUCT TO THE JURY IN VIOLATION OF COURT ORDER.

At the trial, evidence was received of certain conduct and acts of petitioner which allegedly constituted "wrongs" or misconduct of petitioner, but which were not charged against petitioner in the indictment.*

While such evidence may be admissible against a defendant in a criminal case for limited purposes such as,

---

* Said evidence included (1) foredating and backdating of annuity policies; (2) the two suspensions of FSL, petitioner's insurance company, by the Arizona Insurance Commissioner; (3) the liquidation of FSL; (4) the issuance of single premium annuity policies by FSL in consideration for the execution of premium notes; (5) the issuance of annuity package documents in locations other than where indicated on their face; and (6) that reservation of benefits and proceeds riders issued in connection with the single premium annuities were in some cases required to be approved by the Arizona Department of Insurance.

e.g., showing intent, absence of mistake, modus operandi and complete transaction, this Court and, as far as petitioner is aware, all common law jurisdictions require that the jury be appropriately cautioned as to the limited purpose of such evidence to avoid the obvious possibility that a jury might convict a defendant for acts or conduct other than those with which he is charged in the indictment. Baker v. U.S., 310 F.2d 924, 929 (9th Cir. 1962); Anthony v. U.S., 256 F.2d 50, 52-53 (9th Cir. 1958); U.S. v. Parker, 469 F.2d 884, 889-891 (10th Cir. 1972). As this Court has held in connection with the duty of the trial judge to properly and fully charge the jury:

> "It is well settled that the defendant has a right to a full statement of the law from the court, and that a neglect to give such full statement, when the jury consequently fall into error, is sufficient reason for reversal." Bird v. U.S., 180 U.S. 356, 361 (1901).

This fundamental principle was ignored in this case.

At the instruction conference, petitioner's counsel submitted six proposed instructions which would have charged the jury that this evidence could not be considered by it as evidence of petitioner's wrongdoing; however, over petitioner's strenuous objection, the trial court not only refused to give instructions as proposed, but modified them in such a way so as to instruct the jury that, while it could not consider such evidence "standing alone" as any evidence of petitioner's wrongdoing, it could consider these items of evidence "along with all the other evidence in the case." * The trial court's recognition that these items of evidence could not be considered by the jury as proof of petitioner's guilt of the

---

* The six proposed instructions juxtaposed with the six instructions as given by the trial court, are attached hereto as Appendix E-1 through E-6.

charges against him--as shown by the "standing alone" language--was completely and effectively nullified when the trial judge affirmatively allowed the jury to consider this evidence with all the other evidence, without in any way cautioning the jury as to the limited use it could make of this evidence.

The effect of instructing the jury that it could consider these alleged six uncharged misdeeds together with all the evidence in determining petitioner's guilt was exacerbated when the prosecutor, in closing argument, argued these uncharged acts of misconduct as proof of petitioner's guilt, in direct violation of the trial court's admonition that he not do so, and after a lengthy discussion between counsel and the trial court prior to the trial court's admonition. (O 115-123)

> "MR. SMALTZ: I have stated my position for the record.
>
> "THE COURT: Well, [Mr. Lebowitz] where are you going to stand on the useless individual items like that? Are you going to argue them or not, or are you going to couch your argument in terms of the real crux of your case, which is the lulling letters?
>
> "MR. LEBOWITZ: I have intended to do that.
>
> "THE COURT: Huh?
>
> "MR. LEBOWITZ: I have intended to do just that.
>
> "THE COURT: Okay. Do it, then, and we won't have a problem on appeal." (O 123)

In direct defiance of this admonition, and despite his express representations to the contrary, the prosecutor proceeded to argue these items of evidence as proof of petitioner's guilt. (O 274, 279, 281, 285-286 and 289) Additionally, the prosecutor went out of his way to emphasize to the jury that the trial court would be instructing

it to consider all these matters with "all of the other evidence." (O 289)

It is submitted that petitioner was denied fundamental due process rights when the trial judge instructed the jury that it could consider evidence of uncharged misconduct against petitioner as proof of petitioner's guilt of the charges alleged in the indictment, and where such evidence was argued to the jury by the prosecutor in direct violation of the trial court's order. The Memorandum Decision of the Court of Appeals below has no reference to this issue, which was fully presented to it in the appellate briefs filed with said court. We submit that if this Court does not reverse petitioner's conviction because of the fundamental deprivation of due process, this Court should exercise its supervisory powers and reverse the conviction because of the substantial departure in the courts below from the accepted and usual course of judicial proceedings.

VI. PETITIONER WAS DENIED DUE PROCESS OF LAW WHERE THE GOVERNMENT DESPITE HIS REQUEST FAILED TO REVEAL THE FULL DETAILS OF A PLEA BARGAIN ARRANGEMENT MADE WITH THE KEY GOVERNMENT WITNESS AND AFFIRMATIVELY MISLED THE JURY AS TO THE TRUE NATURE OF SAID AGREEMENT.

At the trial, it was revealed that the Government had entered into a contingency plea bargaining "arrangement" with petitioner's co-defendant Edwin Newman (the key Government witness against petitioner)* whose case was severed

---

* Newman, an attorney and since 1959 an associate of petitioner's and number two man in petitioner's organization, was on the stand for five days; he had been intimately connected with petitioner's business activities for over a decade (J 127-128); he was vice-chairman of the board of FSL and president of FGCC (J 130) he was a signatory to all the correspondence emanating from FSL to the lenders, and all the count letters from FSL emanated from him; along with another attorney, he had provided the form of responses to the lenders that FSL utilized, which resulted in petitioner's indictment. (J 341-345)

from petitioner's on the very day the trial was scheduled to begin and seven days before the trial actually commenced. (C.T. 572-574) The written plea bargain agreement, which was represented to petitioner, his counsel, the jury and the trial court as the full and entire agreement between the Government and Newman is attached hereto as Appendix F. It provided in substance that if petitioner pleaded guilty to a felony as charged in the indictment, Newman would plead guilty to two misdemeanor violations of 26 U.S.C. § 7203, and the Government would recommend probation; however, if petitioner was found guilty by a jury after a trial (which is what occurred) and if Newman testified against petitioner in accordance with his statements given to the U. S. Attorney, then upon the U. S. Attorney's exercise of discretion Newman would plead guilty to one count of the indictment (i.e., a felony) and the Government would recommend probation.

On cross-examination of Newman, petitioner's counsel sought to elicit all the details concerning said agreement and the events that led up to it. Newman made reference to discussions between the Government and his counsel concerning offers to testify, meetings on this subject and documents concerning plea-bargaining arrangements. (K 164-168) Newman denied that the Government would permit him to plead to a misdemeanor if he testified at petitioner's trial, even though he recognized that he would lose his license to practice law if tainted with a felony, and that the practice of law was of "paramount interest" to him. (K 184-185)

Thereafter, in order to discover all information in the hands of the Government pertaining to its plea-bargaining arrangement with Newman, petitioner moved the

trial court, both orally and by way of written motion, pursuant to Brady v. Maryland, 373 U.S. 83 (1963), and Giglio v. U.S., 405 U.S. 150 (1972), to require the Government to produce all evidence that related to said plea bargain. (C.T. 361 at 364) (L 101) The motions were denied, and the Government produced nothing. (L 57, 103)

During the Government's closing rebuttal argument, the prosecutor flatly told the jury that Newman had no option to plead to a misdemeanor, that there was no deal with Newman to let him plead to a misdemeanor, and that any suggestion by petitioner's counsel to the contrary was his imagination. (O 259)

On December 17, 1973, approximately ten weeks after petitioner was sentenced and his Notice of Appeal filed, the indictment against Newman was dismissed and he was allowed to plead guilty to two misdemeanor violations of 26 U.S.C. § 7203, and he was placed on probation. (C.T. 546, 579-580)

The record is crystal clear that the Government not only wilfully kept from petitioner's counsel and the jury the full details of its agreement with Newman, but affirmatively misled the jury as to its true nature. Contrary to the prosecutor's misrepresentation, the fact is that the Government not only had the option of giving Newman a misdemeanor after his testimony at petitioner's trial, and upon petitioner's conviction, but it also exercised that option. With Newman's testimony the key to the Government's case against petitioner, and with his credibility a central issue in the case, summary reversal of petitioner's conviction under these circumstances is mandatory. Napue v. Illinois, 360 U.S. 264 (1959); Brady, supra; Giglio, supra.

The Court of Appeals, in its Memorandum Decision

below, stated that the Government's decision "to go somewhat further than the written agreement provided" to allow Newman to plead to a misdemeanor was "made after the trial." (Memorandum, p. 10) There is no evidence in the record to support the Court of Appeals' conclusion that the decision to allow such a plea was in fact made after the trial, except for the unsworn assertions of the prosecutor in the Government's brief filed with the Court of Appeals. On the contrary, the circumstantial evidence is overwhelming that Newman was in fact expecting to plead to a misdemeanor when he testified, considering the value and necessity of his testimony to the Government's case, his intimate cooperation with the prosecutor throughout the proceedings, and the fact that he did ultimately plead to a misdemeanor. Petitioner attempted to seek all possible evidence that would pertain to the plea bargain arrangement during the trial, but was denied the opportunity to do so.

We submit that pursuant to this Court's decisions in Ring v. U.S., ____ U.S.____, 95 S.Ct. 164 (1974), and DeMarco v. U.S., 415 U.S. 449 (1974), if this Court chooses not to summarily reverse petitioner's conviction, at the very least a remand to the district court for an evidentiary hearing is required in order to pinpoint exactly what the full arrangements between Newman and the Government were, and when they were made.

The Court of Appeals in its Memorandum Decision further found no prejudice to petitioner because he was informed that there had been an agreement "for recommended probation" and petitioner was given "full opportunity to cross-examine Newman concerning promises." (Memorandum Decision, p. 10) We submit that the Court of Appeals totally

missed the point. Probation for Newman was only one relevant aspect of any deal that might have been made between him and the Government; the crucial consideration was whether Newman was going to be allowed to plead to a misdemeanor or to a felony -- the latter event leading to much more serious consequences for Newman, including being disbarred from practicing law.

Further, whether petitioner had an opportunity to cross-examine Newman concerning promises is irrelevant to the due process issues raised herein, and the duty of the Government not to suppress evidence or deliberately mislead and misinform the jury as was done here. Indeed, in Giglio, supra, defense counsel "vigorously cross-examined" the Government witness in seeking to reveal any deal between the Government and said witness -- and it was precisely because such cross-examination did not in fact bring out the truth as to the relationship between the Government and the witness that required a reversal in Giglio, as it does in the instant case.

VII. PETITIONER WAS DEPRIVED OF HIS FIFTH AND SIXTH AMENDMENT RIGHTS WHEN THE TRIAL COURT REFUSED TO LET PETITIONER'S ATTORNEYS TESTIFY AS TO THE GOVERNMENT'S THREAT TO INDICT A KEY DEFENSE WITNESS AND TO A MAJOR GOVERNMENT WITNESS' PRIOR INCONSISTENT STATEMENTS.

In Washington v. Texas, 388 U.S. 14, 19 (1967), this Court held that:

> "The right to offer the testimony of witnesses and to compel their attendance if necessary, is in plain terms the right to present a defense * * *. Just as an accused has a right to confront the prosecution's witnesses for the purpose of challenging their testimony he has the right to present his own witnesses to establish a defense and this right is a fundamental element of due process of law."

Just last term in U.S. v. Nixon, ___ U.S. ___, 94 S.Ct. 3090, 3109 (1974), this Court clearly reaffirmed these principles:

> "The right to the production of all evidence at a criminal trial . . . has constitutional dimensions. The Sixth Amendment explicitly confers upon every defendant in a criminal trial the right 'to be confronted with the witnesses against him' and, 'to have compulsory process for obtaining witnesses in his favor.' Moreover, the Fifth Amendment also guarantees that no person shall be deprived of liberty without due process of law. It is the manifest duty of the courts to vindicate those guarantees and to accomplish that it is essential that all relevant and admissible evidence be produced."

These fundamental rights of petitioner were trampled on by the trial court and the Court of Appeals when they effectively held that: An attorney for a defendant in a criminal case is incompetent as a matter of law as a witness for the defense. This holding finds no support in any federal law or case. See Annotation, Attorney As Witness for Client in Federal Case, 9 A.L.R.Fed. 500.

At the trial, petitioner sought to present evidence through the testimony of his lead trial counsel, Mr. Smaltz, that the prosecutor had threatened to indict a proposed defense witness (Schwartz) if said witness testified for the defense.

Additionally, through associate trial counsel, Mr. Nazarian, petitioner sought to prove that a major Government witness (Skillman) had made a statement to Mr. Nazarian prior to trial totally inconsistent with his trial testimony concerning his motives for testifying. Each attorney's proposed testimony was presented to the trial court by way of an offer of proof outside the presence of the jury. (L 259-262, 265-266)

The trial court simply ruled that no attorney in the case would be permitted to testify (L 278), but gave no

reason for its ruling. Assuming that the trial court's refusal to allow such testimony was based on its belief that the attorneys were not competent to testify, the trial court committed plain error, affecting petitioner's substantial rights.

Petitioner is unaware of any case which makes an attorney incompetent to testify on behalf of his client solely because of the attorney-client relationship. Ethically, where the events giving rise to his testimony could not have been anticipated prior to the time he accepted the representation of the client, and the testimony is relevant and material to the client's cause, it is essential that the attorney come forward and testify. ABA Code of Professional Responsibility, Ethical Consideration 5-10.*

The Government's efforts to intimidate Schwartz from testifying occurred when, four days before trial was scheduled to commence, the prosecutor called Mr. Smaltz and told him that there was a significant possibility that Mr. Schwartz would be indicted if he testified and that Mr. Schwartz should receive his Fifth Amendment admonition before he testified, and that Mr. Smaltz should tell that to Mr. Schwartz. (L 259-260) Mr. Smaltz advised Mr. Schwartz.

Mr. Schwartz had served as one of FSL's attorneys during the interval covered by the indictment, and his testimony was totally consistent with petitioner's position

---

* This consideration provides: "In the exceptional situation where it will be manifestly unfair to the client for the lawyer to refuse employment or withdraw when he will likely be a witness on a contested issue, he may serve as advocate even though he may be a witness.[12] "

Footnote 12 thereto provides: "It is a general rule that a lawyer may not testify in litigation in which he is an advocate unless circumstances arise which could not be anticipated and necessary to prevent a miscarriage of justice. In those rare cases where the testimony of an attorney is needed to protect his client's interests, it is not only proper but mandatory that it be forthcoming. (Citation omitted)" Ethical Consideration 5-10, and Footnote 12 thereto, ABA Code of Professional Responsibility.

and contrary to the testimony of the key Government witness Newman on the latter's role and advice which Newman gave to petitioner. The threat was communicated to counsel on May 11, which was the day after Newman agreed to testify for the Government and was designed to inhibit the defense efforts to challenge Newman's testimony.*

The trial court found the prosecutor's conduct "highly improper . . . under the circumstances of this case," but refused to permit petitioner to bring this conduct to the attention of the jury. (L 296)

The relevance of Mr. Smaltz's proposed testimony cannot be questioned -- it tended to show the Government's conscious weakness of its case against petitioner, a well-known and time honored evidentiary principle, and petitioner would have been entitled to an appropriate jury instruction and to argue this principle to the jury.** U.S. v. Katz,

---

* The prosecutor's action was designed to and did have a "chilling effect" on Schwartz, who when called as a witness by petitioner addressed the court outside the presence of the jury, narrated the facts that he had been interviewed in 1968 by the Postal authorities, had been in contact with the U. S. Attorney since 1969, and that no action or suggestion of his criminal involvement had ever been expressed until Mr. Smaltz told him of the prosecutor's threat. Schwartz refused to testify on behalf of petitioner. (L 291) At the direction of the court, Schwartz was granted immunity and ultimately he testified. (L 296-297) The Government was aware of the nature of Schwartz's testimony and his importance to petitioner's case, since it had petitioner under electronic surveillance between January 25 and March 6, 1973 and had intercepted conversations between petitioner and his attorney. (A 115-141) The fact that eavesdropping had been conducted had previously been denied by the Government, who only admitted it after petitioner brought it to the court's attention pursuant to an article in the April 29, 1973, edition of The New York Times. (C.T. 231-253)

** "It has always been understood - the inference, indeed, is one of the simplest in human experiences - that a party's falsehood or other fraud in the preparation and presentation of his cause, his fabrication or suppression of evidence by bribery or spoliation, and all similar conduct, is receivable against him as an indication of his
[cont'd on next page]

78 F.Supp. 435, 438 (M.D.Pa. 1948); U.S. v. Vole, 435 F.2d 774, 778 (7th Cir. 1970).

In the context of the circumstances of this case, the inability of petitioner to present this evidence to the jury monumentally prejudiced petitioner, since Schwartz was the one witness in a position to refute much of Newman's testimony which was so damaging to petitioner, and the prosecutor was well aware of this fact. Additionally, petitioner had been claiming that the Government was using coercive tactics with regard to other witnesses which it called to influence those witnesses' testimony, and this testimony regarding Schwartz would have corroborated this claim.

Mr. Nazarian's proposed testimony would have flatly impeached the testimony of Skillman, a key Government witness whose testimony covers 1,096 pages of transcript. Skillman had pleaded guilty to the indictment and had been sentenced prior to petitioner's trial. He was also serving concurrently the first year of a seven-year sentence on a previous conviction unrelated to this matter. (G 29-30)

Skillman had been maintained by the Government at a hotel in Phoenix from May 5, 1973, through the trial and even after the close of the evidence on July 12. (G 29-30) On direct examination, over petitioner's objections, the Government elicited statements regarding Skillman's cooperation as a Government aide in this and other cases, and asked Skillman whether his "placement in a motel" was at his "insistence" or the Government's arrangement. Skillman denied

---

[cont'd]

consciousness that his case is a weak or unfounded one; and from that consciousness may be inferred the fact itself of the cause's lack of truth and merit. The inference thus does not apply itself necessarily to any specific fact in the cause, but operates indefinitely though strongly, against the whole mass of alleged facts constituting his cause." Vol. II, Wigmore on Evidence, p. 120, § 277, 3d Ed. 1940. (Emphasis added.)

that he insisted on it or that it was at his behest. (E 417-423) Nazarian would have testified that Skillman had told him in a pretrial interview on January 31, 1973, that if he were going to testify on behalf of the Government he required comfortable accommodations and would not stay at the county jail; that he had no sympathy for the lenders (the supposed victims in this case who at trial disclaimed knowledge of the arrangements between the annuitants and FSL) since the lenders were attempting to "clean up" old loans by virtue of their previous dealings with the annuitants. (L 265-266) Skillman not only testified contrariwise on direct; he also on cross-examination denied making any of these statements. (L 266)

Thus, Nazarian's testimony would have impeached Skillman's testimony on both direct and cross-examination and demonstrated Skillman's bias against petitioner. It was a theory of the defense that Skillman would say anything, whether fact or fiction*, to convict petitioner as long as the Government kept him comfortable, and considering that the lengthy prison sentence he had begun serving might be shortened, since the Government was going to seek an early parole for Skillman. (G 40-41)**

At the offer of proof, the trial court was informed that Mr. Nazarian would withdraw as associate

---

* Skillman purported to testify in practically ipsissimis verbis to no fewer than 83 conversations with petitioner between August, 1968, and April, 1969. (E 414 - H 235) His trial testimony contradicted his other prior statements in various ways--most particularly in his attribution to petitioner of actions and responses that he had previously attributed to Newman. Thus, Skillman was able to shift all of the responsibility from Newman to petitioner.

** The significance of Nazarian's proposed impeachment of Skillman becomes even greater, considering the prosecutor's statement in closing argument that Skillman had to stay in a motel because the only federally-approved detention center was at least 60 miles from the courthouse. (O 257-258) Not only did this constitute flagrant prosecutorial misconduct, as there was no evidence to support this "fact," but as petitioner found out after trial, the statement was patently false--the Government had been utilizing the Maricopa County jail in Phoenix since several months prior to trial. See Memorandum, p. 9.

counsel if the court would permit his testimony. The court refused. (L 288)*

In Davis v. Alaska, 415 U.S. 308 (1974), this Court, in the context of the scope of the confrontation clause, held that the Constitution mandated a defendant's right to fully probe by way of impeachment the possible bias of a Government witness because of his vulnerable status as a probationer. This Court long ago recognized the constitutional right of a defendant to impeach a witness by showing that his testimony was biased because of his being in federal custody at the time of trial. Alford v. U.S., 282 U.S. 687 (1931).

It was essential that petitioner be allowed to fully impeach Skillman in connection with his bias against petitioner and his motives for testifying. It is submitted that the failure of the trial court to allow petitioner his right to impeach a key Government witness "[withheld] from the jury information necessary to a discriminating appraisal of [the witness's] trustworthiness to the prejudice of petitioner's substantial rights." Gordon v. U.S., 344 U.S. 414, 417 (1953).

---

* Under the circumstances present in this case, even this offer to withdraw was not legally or ethically required. See page 34, supra. No offer was made by Mr. Smaltz to withdraw as counsel in connection with the threat to Mr. Schwartz, since it would have been futile. The trial court had previously denied a motion by Mr. Smaltz to withdraw for other reasons two months before the trial because of the delay this would have caused; and associate counsel, Mr. Nazarian, who had never tried any case, criminal or civil, in any court, could not have conducted the trial.

VIII. THERE IS NO WORK PRODUCT EXCEPTION TO THE JENCKS ACT, AND WHERE A GOVERNMENT ATTORNEY TAKES NOTES FROM THE KEY PROSECUTION WITNESS AND READS THOSE NOTES BACK TO THE WITNESS WHO CORRECTS SAME, THE NOTES ARE COMPELLABLE UNDER BOTH THE JENCKS ACT AND BRADY V. MARYLAND.

Four days before the scheduled commencement of trial, Newman made his deal with the Government and participated in a 2-1/2 hour question and answer session with the Government attorneys, which resulted in a 90-page sworn statement. The statement concluded with the prosecutor's representation that:

> "We intend to continue this discussion off the record at a later time this weekend, and there are individuals . . . as well as Goldberg transactions . . . which will be explored at a further time." (K 182)

Petitioner was furnished with a copy of this statement.

Thereafter, Newman met on at least five separate occasions with Government attorneys. The meetings were lengthy and there was no reporter present. At those meetings the only record of what Newman said was the notes of the two prosecutors, which they would read back to Newman from time to time, and Newman would correct them.* (K 177-180)

Newman's direct testimony at trial spanned 440 pages of reporter's transcript and covered a multitude of matters which were not noted in this sworn statement to the Government.

At the commencement of cross-examination of Newman, petitioner promptly moved pursuant to the Jencks Act for production of the notes taken by the Government attorneys. The trial court denied the motion on the basis that there was a "work product privilege" that protected the notes.

---

* Neither petitioner nor his counsel was present at any of these meetings.

Thereafter, petitioner renewed his motion (K 184) and requested that the court at least conduct an in camera inspection. The trial court refused to even examine the notes and again denied the motion. (K 240-241) Petitioner subsequently renewed his motion, contending that there was no work product exception and, even if there were, the material was compellable under Brady v. Maryland, 373 U.S. 83 (1963), and its progeny. (C.T. 381-384) It was denied.

At no time did the trial court ever examine the notes, and they were never made a part of the record. In its brief to the Court of Appeals, the Government contended that there was an in camera inspection of the notes; but at oral argument, they withdrew that contention and instead lodged a two-inch thick packet of papers with the Court of Appeals which the prosecutor described blithely as "the notes."

There is no work product exception in § 3500. Indeed, it expressly requires that after a witness has testified on direct:

> "The court shall, on motion of the defendant, order the United States to produce any statement . . . of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified." 18 USC § 3500(e) (Emphasis added.)

At least two circuits have squarely held that there is no work product exception. U.S. v. Smaldone, 484 F.2d 311, 317 (10th Cir. 1973) ["We recognize there is not a work product exception as such."]; and U.S. v. Hilbrich, 341 F.2d 555, 557 (7th Cir. 1965), cert. denied, 381 U.S. 941 (1965) ["There is no 'work product' exception to the Jencks Act."].

The Panel below resolved petitioner's contention as follows:

> "Apart from the question whether such notes were exempt from the Jencks Act (18 USC § 3500) as 'work product' they were not statements of the

> defendant within the meaning of 3500(e). We find no clear, prejudicial error." (Memorandum, p. 8) (Emphasis added.)

Petitioner never contended the notes were his statements--but rather the statements of the witness Newman.

Petitioner does not know whether the Court of Appeals examined the notes tendered to it by the prosecutor. Petitioner assumes that it did; otherwise, the observation that the notes do not constitute statements is inexplicable.

The Jencks Act vests in the trial court the primary responsibility for resolving disputes about whether or not notes constitute a statement, which court is required by the terms of the Act to conduct an in camera inspection.* Here the trial court refused. If the decision of the trial court after a preliminary examination had been adverse, petitioner would at least have had the opportunity to take additional extrinsic evidence to the statement and conditions under which it was taken. Ogden v. U.S., 303 F.2d 724, 732-733 (9th Cir. 1962). See also, Hilliard v. U.S., 317 F.2d 150 (D.C. Cir. 1963).

How the Court of Appeals was able to make an ex parte determination when the papers left with it were not part of the record and not submitted through a procedure that entitled petitioner to challenge the accuracy of the Government's counsel's assertions as to completeness or authenticity, is an anomaly. There is no rule of law or precedent for such a procedure, and the utilization of same flat out violates the commandments of the Jencks Act. Palermo v. U.S., 360 U.S. 343, 349 (1959); and Campbell v. U.S., 365 U.S. 85, 93 (1961).

---

* § 3500(c) provides: "If the United States claims that any statement ordered to be produced . . . does not relate to the subject matter of the testimony of the witness . . . the court shall order the United States to deliver such statement for the inspection of the court in camera."

The Panel, in apparently holding that the "notes" did not constitute statements, ignored not only this Court's holding in Palermo, supra, but also the witness's own testimony that the notes were read back to him from time to time for correction (K 177-180), and the Government's contentions that the notes were prepared "only after lengthy conversations had occurred and a mutual understanding of the factual situation had been reached." (Government's Brief to the Ninth Circuit, p. 64.) The express language of § 3500(e) defines a statement of the witness as follows:

> "The term 'statement,' as used . . . means
>
> "(1) a written statement made by said witness and signed or otherwise adopted or approved by him."

This Court has held that the doctrine of harmless error should be employed with restraint in Jencks Act cases, Rosenberg v. U.S., 360 U.S. 367 (1959), stating:

> "An appellate court should not confidently guess what defendant's attorney might have found useful for impeachment purposes in withholding documents to which the defendant is entitled." Id., 360 U.S. at 371.

In Clancy v. U.S., 365 U.S. 312 (1961), the Court rejected the Government's harmless error argument, stating:

> "Since the production of at least some of the statements withheld was a right of the defense, it is not for us to speculate whether they could have been used effectively." Id., 365 U.S. at 316.

Petitioner's repeated motions for the Government's notes of interviews with Newman were not only premised on the Jencks Act, but also the rule of Brady v. Maryland, 373 U.S. 83 (1963). (L 57) (C.T. 361-364) The Panel below never reached this question. Since the notes were prepared only after the prosecutor and the witness Newman arrived at a "mutual understanding," anything in the notes that contradicted the witness or explained any transaction in a fashion

that was consistent with petitioner's innocence, or tended to exculpate petitioner, or was otherwise useful to petitioner, was nevertheless compellable under the Brady rationale, whether or not it was a "statement" for Jencks Act purposes. The court's failure to order the Government to turn over same to petitioner constituted reversible error. See "Comment, Brady v. Maryland, and the Prosecutor's Duty to Disclose," 40 U.Chic.L.Rev. 112, 119-120 (1972).

The rule established by the Circuit in this case is contrary not only to the holdings of the Seventh and Tenth Circuits in Smaldone, supra, and Hilbrich, supra, but also to the express requirements of 18 U.S.C. § 3500. This Court should issue a writ of certiorari to resolve this issue.

CONCLUSION

For the foregoing reasons, the writ should issue.

DATED: April 2, 1975.

Respectfully submitted,

DONALD C. SMALTZ
and
ANDREW I. SPILKER

By /s/ Donald C. Smaltz
DONALD C. SMALTZ

Attorneys for Petitioner

DO NOT PUBLISH

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

THE UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. PHILIP J. GOLDBERG, *Defendant-Appellant.*	No. 74-1023 MEMORANDUM

[December 18, 1974]

On Appeal from the United States District Court for the District of Arizona

Before: KOELSCH and KILKENNY, Circuit Judges and SWEIGERT, District Judge*

Appellant Goldberg appeals from a judgment imposed by the Court after his conviction by a jury on fourteen counts of an indictment charging violation of 18 U.S.C. § 1341—use of the mail to defraud. He was sentenced to a term of two years imprisonment on each of the 14 counts, the sentences to be served concurrently, and a fine of $1,000 on each count.

Each of the 14 counts charged appellant with a separate transactional instance of use of the mail for the purpose of executing a scheme and artifice to defraud. The scheme alleged in each count was in substance and to the effect that appellant, as President of Financial Security Life Insurance Company, caused the company to issue to various individuals certain so-called single premium annuity policies, purporting to be premium fully prepaid, with a view to their use by the annuitant as collateral for

*The Honorable William T. Sweigert, Senior United States District Judge for the Northern District of California, sitting by designation.

borrowing money from banks and other lending sources; that when lenders, considering such loans, inquired of Financial Security Life Insurance Company (FSL) concerning the status of such policies, appellant caused certain false statements to be made, i.e., that the premiums were paid in full—whereas no payments except interest payments had been made on certain promissory notes accepted by FSL as premium payment; that there were no liens or encumbrances of record against the policies offered as collateral—whereas certain reservations of benefits and proceeds riders reduced the policies to virtually zero; that the face amount of the policy was the cash surrender value that would be paid to the annuitant after the due date specified in the policy whereas said policies were worthless; that appellant concealed and withheld from the lenders the material facts that promissory notes had been accepted by FSL in payment of premiums and that the policies were subject to riders providing that the policies would be reduced by the total amount unpaid; that when the policies issued by FSL were accepted by lenders as collateral and presented for payment the lenders would then be informed by appellant that no amounts were payable because no payments had been made on the promissory notes.

It was contended by appellant at the trial that the policies in question had been properly issued, that the false statements to the lenders "were believed to be correct" and that appellant "had relied upon the advice of his various attorneys." (App. Opp. Brief, p. 6)

Appellant makes no contention that the evidence, if believed by the jury, would be insufficient to support findings adverse to appellant on those issues of fact.

Appellant makes no contention that the evidence, if believed by the jury, would be insufficient to support findings adverse to appellant on those issues of fact.

Appellant asserts insufficiency of the evidence only with respect to the use of the mails element of the case, i.e., (1) the implied finding that the letters referenced in Counts 10 and 12 had been placed in the mail, and (2) the implied finding that the mailings referenced in Counts 2, 12, 16, 4 and 14 were for the purpose of executing, within the meaning of Section 1341, the scheme alleged in those Counts.

BEST COPY AVAILABLE

Other grounds for reversal presented by appellant have to do with claimed errors of the trial judge.

RE INSUFFICIENCY OF THE EVIDENCE

1. *Counts 10 and 12—re Proof of Mailing*

It is well established that one "causes" the mails to be used, within the meaning of Section 1341, when he does an act with knowledge that the use of the mails will follow in the ordinary course of business or where such use can reasonably be foreseen. *Pereira v. United States*, 347 U.S. 1, 8-9 (1954).

Appellant here does not contend in his brief that the letters referenced in the above counts, if mailed, were not so "caused" to be mailed by him; he contends only that there is insufficient evidence to support the finding that the letters referenced in Counts 10 and 12 were actually placed in the mail.

The mailing of the letter referenced in Count 10, Exhibit 13A, a letter of December 31, 1968, allegedly mailed by one Hoover of Western General Corporation to FSL, was supported only by the testimony of Newman (of FSL) to the effect that he received the letter in the mail. However, Hoover could not recall whether he had mailed that letter to Newman or had delivered it to one Kenslow for delivery to Newman. There is no evidence concerning Hoover's customary practice concerning how letters of this kind were transmitted. The evidence shows, however, that shortly after the date of the letter Hoover and Kenslow did come to Phoenix where Kenslow personally presented the annuity policies referred to in the letter, along with other documents, to Newman. Although a copy of the letter appeared in FSL files, no receipt stamp appears on its face; Newman's testimony about receiving the letter "in the mail" was qualified by adding: "as far as I can determine."

The letter referenced in Count 12 was a letter dated January 24, 1968 (Ex. 10B), allegedly mailed by Newman of FSL to one Skillman of American Mortgage Company. Exhibit 10B was an unsigned copy of the letter. There is no testimony from anyone at FSL concerning the mailing of the letter nor any testimony concerning the custom and practice relating to the mailing of such letters. Newman merely testified that Exhibit 10B was a

copy of a letter of January 24, 1969 from him to Skillman. Neither the original of the letter nor the envelope was produced at trial. The copy was received in evidence upon testimony of Skillman that he "received" the letter in the mail.

It is settled that use of the mails, like most other facts, need not be established by direct evidence; it may be established by circumstantial evidence provided, of course, that the circumstances are such as to reasonably support an inference of mailing beyond reasonable doubt. *United States v. Fassoulis*, 445 F.2d 13, 17 (2d Cir. 1971). Appellant contends, however, that there is no such evidence of the mailings referenced in Counts 10 and 12.

An examination of cases discussing the standards and guidelines for proof of the mailing requirement of Section 1341 (*United States v. Fassoulis*, supra; *United States v. Leathers*, 135 F.2d 507 (2d Cir. 1943); *Whealton v. United States*, 113 F.2d 710, 713 (1940); *United States v. Baker*, 50 F.2d 122 (2d Cir. 1931); *Mackett v. United States*, 90 F.2d 462 (7th Cir. 1937); *Freeman v. United States*, 20 F.2d 748 (3d Cir. 1927), leads us to the conclusion that proof of mailing the letter referenced in Count 10 falls far short of the guidelines set by even the most liberal of these cases, e.g., *Fassoulis*, *Leathers*, supra) and is insufficient within the meaning of such cases as *Baker*, supra; *Freeman*, supra; *Mackett*, supra and *Whealton*, supra.

We are of the opinion, however, that within the meaning of *United States v. Leathers*, supra, the evidence is sufficient to support the implied finding of the mailing of the letter (Ex. 10B) referenced in Count 12.

2. *Re Counts 2, 12, 16, 4 and 14—re Proof that Mailing in Execution of the Schemes Charged*

Again we note that appellant makes no contention that the letters referenced in the above counts, if they were mailed in execution of the alleged scheme, would not have been "caused" to be mailed by appellant within the meaning of Section 1341. Defendant argues only that the letters were not "for the purpose of executing the scheme" within the meaning of the statute.

Since we have already determined that the convictions on Count 10 must be reversed for failure to prove mailing of the letter ref-

erenced in that count, it is unnecessary to consider defendant's further contention that the letters were not in execution of the scheme.

The letter referenced in Count 2, Exhibit 4A, was a letter dated July 31, 1968, from one Tucker to FSL, relating to single premium life insurances policies—not single premium annuities. Appellant contends that, therefore, it could not be considered to be in furtherance of the scheme charged in Count 2 which refers only to annuities.

The evidence is to the effect that in the summer of 1968 one Tucker, a New York financial broker, had called FSL to discuss mortgage loan commitments and later to discuss the issuance of single premium life insurance policies (not annuity policies). Eventually, Tucker visited FSL at Phoenix and discussed single premium life insurance policies with defendant. It was not, however, until near the end of August, 1968, i.e., after the date of his July 31, 1968 letter, that Tucker for the first time discussed with defendant the possibilities of using single premium annuities.

We find no merit in appellant's narrow point; the correspondence in question led to the ultimate use of annuity policies. Although the July 31, 1968 letter refers only to life insurance policies (as distinguished from annuity policies), Tucker's subsequent contribution of ideas concerning annuity policies stemmed from that earlier correspondence and the letter, therefore, can be deemed to have been in that sense in furtherance of the scheme charged.

The letter referenced in Count 16, Exhibit 5Y, was a letter dated May 6, 1969, from Royal National Bank to FSL demanding that FSL make payment to the bank of certain annuities under a policy which the bank had previously accepted as collateral for a loan. The evidence is to the effect that the letter, making demand for payment by FSL, was mailed 18 months after the bank had actually accepted the policies as collateral.

Appellant contends, citing and relying on *United States v. Maze*, 414 U.S. 395 (1974); *Parr v. United States*, 363 U.S. 370 (1960); *Kann v. United States*, 323 U.S. 88 (1944), that the scheme had reached fruition when the bank accepted the policies

as collateral and that, therefore, the letter could not be considered to have been in execution of the scheme charged in Count 16.

In *Maze*, supra, the letter in question was mailed to a bank by the true owner of the bank's credit card requesting adjustment of his account after *Maze*, the defendant in that case, had stolen and misused the credit card to obtain lodging at various motels. The court held (p. 402) that Maze's scheme had already reached fruition when he checked out of the motels and that there was no indication that the success of his scheme depended in any way on the adjustment of loss between his victims.

In the present case, however, the letter in question was from the bank which had been victimized by its acceptance of the policy as collateral, but it was written, not to another victim (as in *Maze*), but to the defrauder, himself, seeking, not merely to adjust a discovered loss, but to realize on the policy collateral, something that appellant herein would reasonably have expected to happen at some time during the period the bank held the collateral in reliance upon appellant's false representation.

Whether a mailing is in furtherance of a scheme does not depend upon mechanical determination of when the mailing occurs but upon a determination of the contribution made by the mailing to the scheme's success. *United States v. Kelem*, 416 F.2d 346, 350 (9th Cir. 1969).

We are of the opinion, therefore, that here, appellant's scheme had not reached fruition, as in *Maze*, but was in effect continuing up to the time of writing the letter (Ex. 5Y) the mailing of which was caused by appellant and was also in this sense in execution of the scheme.

The letter referenced in Count 4, Exhibit 8B, was a letter dated December 17, 1968, from Newman of FSL to Herman of First National Bank of Mason City in response to a letter inquiry from Herman, dated December 9, 1968, concerning an application of one Darden for a loan based on an FSL policy as collateral.

The evidence is to the effect that on the following day, December 10th (six days before FSL mailed the Count 4 referenced letter), Herman decided not to make the loan to Darden. Appellant contends that, therefore, the letter could not be con-

sidered as being in furtherance of the scheme charged in Count 4. (See App. Brief p. 85-101).

We cannot agree. The referenced letter (Ex. 8B) was obviously intended to further the scheme and the mere fact that appellant did not know that the bank had already decided to reject the loan for other reasons does not excuse appellant.

The letter referenced in Count 11, Exhibit 16C, was a letter dated February 7, 1969, from one Friedman of National Bank of North America to FSL inquiring concerning certain FSL policies presented to the bank on the previous day by one Kenslow as further collateral for loans which the bank had already made to Kenslow on January 7, 1969 and January 15, 1969 on the basis, according to defendant, of Kenslow's note rather than on the basis of the FSL policy collateral. Appellant contends that, therefore, Exhibit 16C could not be considered as in execution of the scheme alleged in Count 11; appellant makes a similar contention as to the letter referenced in Count 14, Exhibit 16F, a letter from Newman of FSL to National Bank of North America, dated March 21, 1969, responding to the Exhibit 16C letter referenced in Count 11.

We disagree. Obviously, the sending of Exhibit 16C by the bank indicates that the bank was relying, to some extent at least, on the further security of the policies. Appellant's response to the bank (Ex. 14) was, therefore, in furtherance of appellant's scheme.

RE ERRORS OF LAW

Defendant contends that the trial court erroneously refused to dismiss the indictment upon the grounds that it had been returned after only a one-hour grand jury hearing on other variously asserted charges of "perversion" by the government of the grand jury proceedings. We are satisfied that this ruling of the trial court did not constitute clear prejudicial error. See *United States v. Costello*, 350 U.S. 359 (1956).

Defendant contends that the trial court erroneously refused to order the government either to refrain from using or to deliver to defendant a copy of a so-called "jury book"—the United States Attorney's notes concerning the voting record and any known idiosyncracies of jurors on the panel. We are satisfied that this

refusal did not constitute prejudicial error even under the circumstances argued by defendant. See *Hamer v. United States*, 259 F.2d 274 (9th Cir. 1958).

Defendant further contends that the trial judge erroneously refused to order government disclosure of certain notes taken by Assistant United States Attorneys reflecting the substance of, but not verbatim, discussions with government witness Newman. These notes were taken in discussions with Newman after Newman's written statement of May 11, 1973 which was disclosed to defendant. Apart from the question whether such notes were exempt from the Jencks Act (18 U.S.C. § 3500) as "work product," they were not statements of the defendant within the meaning of § 3500(e). We find no clear, prejudicial error.

Defendant further contends that the trial court erred in permitting cross-examination of the defendant on matters which, defendant asserts, were beyond the scope of direct examination.

Considered in the light of the length and tenor of defendant's direct examination to the effect that his own conduct was free of any intent to defraud and that he was unaware of any improprieties and that he was victimized by his reliance on others, we cannot say that the cross-examination which was allowed by the trial court to refute defendant's testimony, was unreasonable or in excess of the bounds of cross-examination. We find no clear, prejudicial error.

Defendant further contends that the trial court erred in refusing to allow one of defendant's attorneys (Smaltz) to testify concerning an alleged government threat to indict a prospective defense witness (Schwartz) if he testified.

The trial court hearing on this point, held outside the presence of the jury, shows an offer of proof concerning, not a government threat against Schwartz, but only a government statement to defendant's counsel (Smaltz) to the effect that, if defendant intended to call Schwartz, he (defendant's counsel) should inform Schwartz of his Fifth Amendment rights because, if Schwartz testified, there was a considerable possibility he might be indicted; that defendant's counsel did so inform Schwartz; that, upon suggestion of the court, Schwartz was then granted immunity and did testify.

An examination of the record on this point satisfies the court that there was no abuse of discretion on the part of the trial court. We find no clear, prejudicial error.

Defendant contends that the trial court erroneously refused to allow one of the defendant's attorneys (Nazarian) to testify concerning claimed inconsistent statements of the government's witness (Skillman) to the effect that Skillman had stated to Nazarian during an interview with Skillman at the Holiday Inn in Phoenix just prior to the Goldberg trial, that he (Skillman) had informed an Assistant United States Attorney, that, if he (Skillman) was to testify for the government, he wanted comfortable accommodations and would not stay in a county jail—a statement which Skillman had on cross-examination denied making.

Considering the circumstances shown by the record we are of the opinion that the trial court's refusal to allow Nazarian, who had participated as defendant's counsel, to testify to the claimed inconsistent statements of Skillman was not in abuse of discretion. Skillman had been cross-examined by defendant's counsel on these statements allegedly made to Nazarian, yet Nazarian continued as co-counsel for two to three weeks thereafter without either withdrawing or indicating to the government that he was a potential witness in the case. We find no clear, prejudicial error.

Defendant further contends that during the government's rebuttal argument to the jury, government counsel made statements of fact, referring to Stillman's testimony above referred to but not shown by any evidence, to the effect that witnesses brought by the government from federal penitentiaries to testify, normally stay at the closest federally approved detention center, normally a jail within a city, but that Phoenix did not have such a federally approved detention center and the closest was at Florence—60 miles away.

Defendant contends that this statement was, not only outside the evidence, but also false. Defendant attaches to his brief a copy of a contract between the Bureau of Prisons and Maricopa County providing for detention of federal prisoners at the Maricopa County Jail. Defendant's counsel, conceding that no objection was made at trial to this claimed improper argument, explains that he did not know the true state of affairs until after the trial.

APPENDIX A

Appellee concedes that its remark concerning the non-existence of a federally approved jail near Phoenix was erroneously but innocently made and, further, that its remark concerning safety was made in a good faith attempt to indicate that prisoners who are called to testify for the government are sometimes kept apart from other prisoners in the interest of protecting the witness, not from the defendant in the case, but from other prisoners. Considering all the circumstances shown by the record, we are satisfied that the remarks of government counsel on these matters, which was quite collateral to the main issues, were not so out of line as to deprive defendant of a fair trial. We find no clear, prejudicial error.

Defendant contends that the trial court erroneously refused during the cross-examination of government witness, Newman, to make an order requiring the government to produce all its records of conversations between attorneys for Newman and attorneys for the government relating to the making of a written plea bargaining agreement with Newman that had been reduced to writing and disclosed to counsel for appellant.

Defendant argues that, although the written agreement was to the effect that Newman was to plead guilty to one count of the indictment and although Newman admitted to that effect on the stand, the government, after the Goldberg trial, actually permitted Newman to plead to new misdemeanor charges and dismissed the felony indictment charges.

On this point we are satisfied that the government's decision, made after the trial, to go somewhat further than the written agreement provided, did not amount to a failure to fully disclose a bargaining agreement with the witness Newman. Even if it did, it would not have prejudiced defendant who had been timely informed of the written bargaining agreement for recommended probation and given full opportunity to cross-examine Newman concerning promises. See, *United States v. Polizzi*, 500 F.2d 856 (9th Cir. 1974). We find no clear, prejudicial error.

For the reasons above set forth the judgment of the District Court is affirmed except that the judgment on Count 10 is reversed.

FERNAU-WALSH PRINTING CO., SAN FRANCISCO 12-26-74—400

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
FEB 5 1975
CLERK
U.S. COURT OF APPEALS

FEB - 5 1975
Docketed

THE UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

PHILIP J. GOLDBERG,

Defendant-Appellant.

No. 74-1023

(Sc-70-517wfc)

Before: KOELSCH and KILKENNY, Circuit Judges, and SWEIGERT,* District Judge.

ORDER DENYING PETITION FOR REHEARING AND REJECTING SUGGESTION FOR REHEARING IN BANC

The members of the panel voted unanimously to deny the petition for panel rehearing. Judge Koelsch voted against a rehearing in banc, and Judges Kilkenny and Sweigert recommended against such a rehearing.

The full court has been advised of the suggestion for an in banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. F. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing in banc is rejected.

* The Honorable William T. Sweigert, United States District Judge for the Northern District of California, sitting by designation.

APPENDIX B

18 U.S.C. § 3500. Demands for production of statements and reports of witnesses.

(a) In any criminal prosecution brought by the United States, no statement or report in possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has tesified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to the defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

APPENDIX C
(Page 1 of 2)

(d) If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement" as used in subsections (b), (c) and (d) of this section in relation to any witness called by the United States, means -

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

APPENDIX C
(Page 2 of 2)

DEFENDANT'S PROPOSED INSTRUCTION:

39

Where a defendant has offered evidence of good general reputation for truth and veracity, or honesty and integrity, or as a law-abiding citizen, the jury should consider such evidence along with all the other evidence in the case.

* * *

Evidence of a defendant's reputation, inconsistent with those traits of character ordinarily involved in the commission of the crime charged may give rise to a reasonable doubt, since the jury may think it improbable that a person of good character in respect to those traits would commit such a crime.

The jury will always bear in mind that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witness or producing any evidence.

Devitt & Blackmar, Vol. 1, Section 11.30, modified.

C.T. 464

APPENDIX D

PROPOSED INSTRUCTION:

Z6

You have heard evidence that either all, or substantially all, of the single-premium annuity policies which were issued by Financial Security Life Insurance Co. were paid for by the execution of premium notes. You have also heard expert testimony to the effect that a premium note is valid consideration for the issuance of an annuity pursuant to the laws of the State of Arizona.

Therefore, you are not to infer, either directly or indirectly, that there was any irregularity or wrongdoing on the part of F.S.L. or the defendant, Mr. Goldberg, in issuing these single-premium annuities in exchange for the execution of a premium note.

U. S. v. Pfizer, 426 F.2d 32, 39 (2nd Cir. 1970), rehearing denied 437 F.2d 957 (2nd Cir. 1970).

Cf. Devitt & Blackmar, Vol. 1, Section 10.13.

C.T. 451

INSTRUCTION AS GIVEN:

You have heard evidence that either all, or substantially all, of the single premium annuity policies which were issued by Financial Security Life Insurance Company were paid for by the execution of premium notes. You have also heard expert testimony to the effect that a premium note is valid consideration for the issuance of an annuity pursuant to the laws of the State of Arizona.

Therefore, you are not to infer, either directly or indirectly, that, standing alone, there was any irregularity or wrongdoing on the part of FSL or the defendant on trial in issuing these single premium annuities in exchange for the execution of a premium note. However, you may consider this matter along with all other evidence in the case.

R.T. O 334-335

PROPOSED INSTRUCTION:

27

There has been undisputed testimony in this case regarding the fact that Financial Security Life Insurance issued certain single-premium annuity policies which bore issuance dates which were not necessarily the dates that said policies were delivered to the respective annuitants. You have also heard testimony from several witnesses that this is a custom and practice in the insurance industry.

Therefore, you are instructed not to consider the foredating or backdating of these single-premium annuity policies as any evidence of wrongdoing on the part of the defendant, Mr. Goldberg.

U. S. v. Pfizer, 426 F.2d 32, 39 (2nd Cir. 1970), rehearing denied 437 F.2d 957 (2nd Cir. 1970).

Cf. Devitt & Blackmar, Vol. 1, Section 10.13.

C.T. 452

INSTRUCTION AS GIVEN:

There has been undisputed testimony in this case regarding the fact that Financial Security Life Insurance issued certain single premium annuity policies which bore issuance dates which were not necessarily the dates that said policies were delivered to the respective annuitants. You have also heard testimony from several witnesses that this is not unusual in the insurance industry.

Therefore, you are instructed not to consider the foredating or backdating of these single premium annuity policies, standing alone, as any evidence of wrongdoing on the part of the defendant. However, you may consider these facts and this matter along with other evidence in the case.

R.T. O 335

PROPOSED INSTRUCTION:

28

There has been testimony that some of the documents that constituted the annuity package were executed in New York, New York and in San Francisco, California, whereas the documents indicate on their face that they were executed in Phoenix, Arizona.

These facts do not in and of themselves constitute any part of the charges in this case, and therefore, are not to be considered by you, either directly or indirectly, during your deliberations.

U. S. v. Pfizer, 426 F.2d 32, 39 (2nd Cir. 1970), rehearing denied 437 F.2d 957 (2nd Cir. 1970).

Cf. Devitt & Blackmar, Vol. 1, Section 10.13.

C.T. 453

INSTRUCTION AS GIVEN:

There has been testimony that some of the documents that constituted the annuity package were executed in New York, New York and in San Francisco, California, whereas the documents indicate on their face that they were executed in Phoenix, Arizona. Again, these facts, standing alone, do not in and of themselves constitute wrongdoing under the indictment. However, you may consider these facts also along with all the other evidence in the case.

R.T. O 335-336

PROPOSED INSTRUCTION:

29

You will recall that there was some testimony regarding whether or not the reservation of benefits and proceeds riders which were used in connection with these single-premium annuities were ever submitted for approval to the Arizona Department of Insurance. You will also recall that Mr. Humphrey, who is the Director of Insurance for the State of Arizona, recited from the Arizona Revised Statutes, specifically Section 20-1110, which exempts the reservation of benefits form used in connection with these annuities from any approval requirement.

Therefore, even if you were to conclude from the evidence presented that said reservation of benefits and proceeds rider was not submitted to the Department of Insurance for approval, you are not to consider that fact, either directly or indirectly, as any evidence of wrongdoing, in connection with your deliberation.

U. S. v. Pfizer, 426 F.2d 32, 39 (2nd Cir. 1970), rehearing denied 437 F.2d 957 (2nd Cir. 1970).

Cf. Devitt & Blackmar, Vol. 1, Section 10.13.

C.T. 454

INSTRUCTION AS GIVEN:

You will recall, also, that there was some testimony regarding whether or not the reservation of benefits and proceeds riders which were issued in connection with these single premium annuities were ever submitted for approval to the Arizona Department of Insurance. You will also recall that Mr. Humphrey, who is the Director of Insurance for the State of Arizona, recited from the Arizona Revised Statutes specifically Section 20-1110, which exempts the reservation of benefits form used in connection with these annuities from any approval requirement, if requested by the policyholder.

[continued on next page]

APPENDIX E-4
A142

INSTRUCTION AS GIVEN [cont'd]:

Therefore, if you were to conclude from the evidence presented that said reservation of benefits and proceeds rider was requested by the policyholder, then you are not to consider the fact, standing alone, that it was not submitted to the department for approval, as evidence of wrongdoing, in connection with your deliberation, but you may consider that fact again in the context of all other evidence in the case.

Even if you should conclude that the reservation of benefits and proceeds rider should have been submitted for approval, that fact, standing alone, would not constitute fraud but it may be considered by you in context with all the other evidence in the case.

R.T. O 336-337

APPENDIX E-4
(Page 2 of 2)

PROPOSED INSTRUCTION:

35

You must not infer, directly or indirectly, that there was any wrongdoing on the part of the defendant, Mr. Goldberg, merely because the Insurance Commissioner suspended Financial Security Life Insurance Co. from doing business between October 16, 1968 to November 29, 1969.

Devitt & Blackmar, Vol. 1, Section 11.05.

U. S. v. Rucker, 435 F.2d 950 (8th Cir. 1971).

Cf. Devitt & Blackmar, Vol. 1, Section 10.13.

C.T. 460

INSTRUCTION AS GIVEN:

You must not infer, directly or indirectly, that there was any wrongdoing on the part of the defendant merely because of the fact, standing alone, that the insurance commissioner suspended Financial Security Life Insurance Company from doing business.

R.T. O 338-339

BEST COPY AVAILABLE

APPENDIX E-5

PROPOSED INSTRUCTION:

2

You must not infer, directly or indirectly, that there was any wrongdoing on the part of the defendant, Mr. Goldberg, merely because the Insurance Commissioner suspended Financial Security Life Insurance Co. from doing business on April 18, 1969. Further, you must not infer, directly or indirectly, any wrongdoing on the part of Mr. Goldberg by virtue of the fact that Financial Security Life went into liquidation in January, 1970.

Devitt & Blackmar, Vol. 1, Section 11.05.

U. S. v. Rucker, 435 F.2d 950 (8th Cir. 1971)

C.T. 421

INSTRUCTION AS GIVEN:

Further, you must not infer, directly or indirectly, any wrongdoing on the part of the defendant on trial, as charged in the indictment, by virtue of the fact, standing alone, that Financial Security Life went into liquidation in January 1970.

R.T. O 339

APPENDIX E-6

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA, Plaintiff, vs. PHILIP J. GOLDBERG, Defendant.	No. CR-70-517-PHX. WPC AGREEMENT OF EDWIN S. NEWMAN

Pursuant to negotiations conducted by Ronald A. Lebowitz and Joseph Raymond Keilp, Assistant U. S. Attorneys, and Tom Galbraith, counsel for the defendant, I, Edwin S. Newman, do hereby agree:

1. To waive all Fifth Amendment rights that I may have in the above-styled cause, and give to the United States a complete statement under oath concerning those events which are the subject for prosecution in CR-70-517-Phx. WPC.

2. In the event that co-defendant, Philip J. Goldberg, elects to enter a plea of guilty to a felony as charged in the indictment in CR-70-517-Phx. WPC, Edwin S. Newman will enter a plea to two separate violations of Title 26, U.S.C., §7203, and the government will recommend probation.

3. In the event that co-defendant, Philip J. Goldberg proceeds to trial, resulting in a finding of guilty

Q 3

Appendix F

BEST COPY AVAILABLE

by way of a jury verdict in CR-70-517-Phx. WPC, the following events will occur.

(a) The government will sever Edwin S. Newman and Edwin S. Newman will testify as a witness for the United States, said testimony being in conformity with the statement having been given to the United States Attorney under oath before trial.

(b) Edwin S. Newman shall, after conviction of co-defendant Philip J. Goldberg, and upon the exercise of discretion to be held for all purposes by the office of the United States Attorney, enter a plea to one count of the indictment in CR-70-517-Phx. WPC, whereupon the United States shall recommend the disposition of probation as to Edwin S. Newman and shall dismiss all remaining counts in CR-70-517-Phx. WPC.

4. Furthermore, I, Edwin S. Newman, do expressly understand that in the event I fail to honor the terms of this agreement upon the conclusion of a trial of Philip J. Goldberg which results in a conviction, that the United States Attorney shall use my pretrial statement under oath as well as my testimony at the trial of Philip J. Goldberg against me in a subsequent trial in CR-70-517-Phx. WPC.

I do hereby certify that I have read, understood, and agree to follow the terms of this agreement.

EDWIN S. NEWMAN
Defendant

TOM CALDWELL
Attorney for Edwin S. Newman

WILLIAM C. SMITHERMAN
United States Attorney

RONALD A. LEBOWITZ
Assistant U. S. Attorney

JOSEPH J. KELLY
Assistant U. S. Attorney

STATE OF ARIZONA)
) ss
COUNTY OF MARICOPA)

EDWIN S. NEWMAN, Defendant, TOM GALBRAITH, Attorney for Edwin S. Newman, RONALD A. LEBOWITZ, Assistant U. S. Attorney, and JOSEPH RAYMOND KEILP, Assistant U. S. Attorney, each being first duly sworn upon his oath deposes and says:

The signatures on the foregoing Agreement of Edwin S. Newman are true and valid.

DATED this 11th day of May, 1973.

EDWIN S. NEWMAN, Defendant

TOM GALBRAITH
Attorney for Edwin S. Newman

WILLIAM C. SMITHERMAN
United States Attorney

RONALD A. LEBOWITZ
Assistant U. S. Attorney

JOSEPH RAYMOND KEILP
Assistant U. S. Attorney

Subscribed and sworn to before me this 11th day of May, 1973.

Notary Public

My Commission Expires Jan. 11, 1974